Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-2041

IN THE

Supreme Court of the United States

October Term, 1980.

EUGENE F. CLAYTON,

Appellant,

vs.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK, AND THE BOARD OF EDUCATION THEREOF,

Appellees.

APPEAL FROM NEW YORK COURT OF APPEALS.

MOTION TO DISMISS APPEAL.

FRANK C. SHAW
SHAW, ESWORTHY, O'BRIEN & CROWLEY
Attorneys for Appellees
123 Front Street
Binghamton, N. Y. 13905
(607) 723-5408

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TABLE OF AUTHORITIES

NOTE: Several of the cases involving the parties herein have substantially the same title as this action. To avoid lengthy repetition, same will be referred to herein as *"Clayton v. Appellees"* followed by the state citation.

TITLE	Cited herein at Pages
Bott v. BOE, Deposit CSD, 41 NY 2d 265, 392 NYS 2d 274, 360 NE 2d 952 (Feb 8, 1978)	12, 11
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Elmer F. Hodgkins, et al v. CSD No. 1 of the Towns of Conklin, etc. and Ewald B. Nyquist as Commissioner of Education of the State of New York, Intervenor-Respondent, 28 Misc. 2d 91, 355 NYS 2d 932, aff'd 48 AD 2d 302, 308 NYS 2d 891 10

Pell v. Board of Education, et al, NY Ct of Appeals (May 15, 1974) 34 NY 2d 222, 356 NYS 2d 833, 313 NE 2d 321 15

The following is presented in support of Appellees' motion to dismiss the appeal herein.

POINT I

THE HIGHEST COURT OF THE STATE OF NEW YORK WAS NOT IMPRESSED WITH THE SAME ALLEGED CONSTITUTIONAL QUESTIONS RELIED ON IN APPELLANTS' JURISDICTIONAL STATEMENT HEREIN.

In fact the Court of Appeals dismissed Appellant's appeal to it *sua sponte* on the grounds that no substantial constitutional question is directly involved. *Clayton v. Board of Education of CSD No. 1, etc.*, 49 NY 2d 888, 427 NYS2d 992, (Case one)Mar. 27, 1980 (Appellant's Appendix B-1, page A-8).

The Constitution of the State of New York, Article 6, Section 3-a limits the jurisdiction of its highest court, the "Court of Appeals" to the review of questions of law (except where

the Appellate Division below in reversing or modifying finds new facts). (Appendix A, Pg. A-1)

The State's Civil Practice Law and Rules, hereafter "CPLR", in concert with additional constitutional provisions not pertinent here provides two routes by which a litigant may appeal to the Court of Appeals:

I. By permission of either the Appellate Division or the Court of Appeals when the matter is not appealable as of right. CPLR 5602 (a) 1 (i) - Appendix B, Pg. A- 2)

II. "As of right" under CPLR 5601 (a) Where there is a dissent, on a question of law or a reversal . . .; or (b) On "Constitutional Grounds" (i) "...where there is directly involved the constitution of the state or of the United States." (Appendix C, Pg. A- 4)

Appellant was unable to use CPLR 5601 (a) because the Appellate Division unanimously affirmed the decision of the lower court. Further, Appellant chose not to seek permission from either court and his time to do so has expired. CPLR 5513 (b) and 5514 (a) provide additional time for appeals by permission if the Court of Appeals rules that the appeal does not lie "as of right". (Appendix D, Pg. A- 5)

Thus, in a very real sense, Appellant is not appealing to this court from a final decision of the highest state court as required by Title 28 United States Code Section 1257.

In all appeals, Rule 500.2 of the New York Court of Appeals[1] requires a "jurisdictional statement" showing how and why it has jurisdiction of the proposed appeal.

[1] *Appendix E, Pg. A- 6)*

Appellant's jurisdictional statement included almost four pages wherein he set forth the same facts and arguments made to this court in his jurisdictional statement only in more detail and citing many U.S. cases in support of his arguments. This portion of the New York jurisdictional statement is included herein as Appendix F, Pg. A-7 .

In spite of same, the Clerk of the Court of Appeals wrote counsel stating in part

> "The Court may examine its subject matter jurisdiction *sua sponte* with respect to whether a substantial constitutional question is directly involved in the appeal. . ."

The full text of this letter is set forth in Appendix G, Pg. A-14. It gave appellant's counsel ten days to present additional (written) comments justifying the relention of subject matter jurisdiction.

Counsel responded with a two page letter repeating previous arguments

and dwelling at some length on the letter to the editor angles in the case. See Appendix H, Pg. A-16. In reply, counsel for Appellee herein submitted to the New York Court a three page letter pointing out that the alleged "constitutional issues" except refusal of both lower courts to apply the amendments retroactively had been before the Court of Appeals on the first occasion this matter was before it. This letter is reproduced on Appendix I, Pg. A-20.

Shortly thereafter the Court of Appeals *sua sponte* dismissed the appeal

> "...(U)pon the ground that no substantial constitutional question is directly involved." *Clayton*, above.

This court is asked to take judicial notice that the Constitution of the State of New York contains clauses similar to those in the United States Constitution alleged to have been

violated.

It is submitted that the highest court of the State of New York is neither insensitive to civil rights matters nor unlearned with respect to constitutional issues (State or Federal).

On the basis of the foregoing, appellees urge that this appeal should be dismissed on the ground that it does not present a substantial Federal question.

ADDITIONAL FACTS

The Appellant's jurisdictional statement does not give a fully rounded abstract of the facts of this case nor of all the litigation the facts spawned.

Appellee school district had a policy which permitted teachers to physically discipline children but such corporal punishment had to be "reasonable in manner and moderate in degree".

About the same time the scenario of this case began, another teacher in Appellee district yanked a strip of scalp approximately 5 inches long and 1½ inches wide from the head of a young boy. There were other incidents in this and other districts in this area although same are not part of this record. As might be expected, there was public indignation over what seemed to be a rash of incidents of abuse. Part of the case against Appellant was that he persisted in using force on

children in spite of specific instructions not to touch students. The complete charges and specifications are set forth as Appendix J, Pg. A-25.

The scalp tearing incident precipitated a general determination to do something about the whole situation. Mr. Pratt had a perfect right under local law to file charges. Anyone could file preliminary charges but as the statute[1] shows, the full Board of Education (in this case nine persons) had to find probable cause before formal charges could be preferred and the rest of the statutory procedure set in motion. Mr. Pratt filed preliminary charges against both appellant and against the teacher who

[1] *Education Law 3020-a set forth in Appellant's jurisdictional statement at Appendix A-1, Pg. A-1.*

yanked the scalp out of the boy's head. The charges were similar but the only connection between the two teachers charged is that both happened to be music teachers.

Appellant, among other things, was found guilty of engaging in a common brawl with a student in a classroom by straddling the student while pounding his back and neck. Bruises were still visible the next day on the student.

The Board of Education found probable cause and formally charged both teachers. The two teachers then commenced a joint action to restrain the proceedings on the grounds that both the statute itself and newly promulgated regulations of the State Commissioner of Education were unconstitutional. Plaintiffs relied heavily on a Federal District case from the Western District of New York *Kinsella v. Board of Education*, 378 Fed Supp 54.

The State Commissioner of Education intervened; the Appellate Division affirmed the lower court (Supreme Court, Broome County, N.Y.) which held the statute and the new regulations constitutional and further ordered that the statutory proceedings proceed. See *Elmer F. Hodgkins, et al v. Central SD No. 1 of the Towns of Conklin, etc. and Ewald B. Nyquist, as Commissioner of Education of the State of New York, Intervenor-Respondent*, 28 Misc. 2d 355, 355 NYS 2d 932 affirmed 48 AD 2d 302, 368 NYS 2d 891.

Appeal to the Court of Appeals from this decision did not lie as of right because it was a unanimous affirmance. No attempt was made to appeal to the Court of Appeals on constitutional grounds nor by permission; nor was any appeal to this court attempted although some points

raised herein are identical to issues argued in that action.

The statutory proceedings did proceed as outlined in Appellant's jurisdictional statement. The Board of Education found both teachers guilty as charged and set the penalty at dismissal. Each teacher then commenced separate "Article 78" proceedings to set aside his dismissal.

One of the main issues in both cases was whether or not the charge of "using excessive physical force" was a proper charge under the State's tenure law (Ed.L. 3012(2) (set forth at Appendix K, Pg. A-30). Use of excessive physical force was not specifically enumerated.[1]

It happened that a very similar case *Bott v. BOE Deposit CSD*, 41 NY 2d 265,

[1] *Appellant was charged with insubordination, conduct unbecoming a teacher as well as use of excessive force.*

392 NYS 2d 274, 360 NE 2d 952 (Feb. 8, 1978) raised the same question of whether use of excessive force is a valid charge in tenure-breaking proceedings under State law. The Court of Appeals announced its decision in *Bott* about a week before Appellant's case and the scalp tearing case were argued before it. *Bott* held, in a long and detailed opinion, that excessive or otherwise improper use of physical force against pupils comes within the scope of the statute. (Ed.L. 3012)

In Appellant's case[1] the court merely referred to *Bott* and found the records in both cases satisfied the "substantial evidence" requirements for such administrative proceedings, sustained all

[1] *Clayton v. BOE CSD No. 1 of the Towns of Conklin, etc., 41 NY 2d 966, (memorandum decision) 394 NYS 2d 882, 363 NE 2d 588 (Mar. 31, 1977)*

charges in the scalp tearing case as well as the penalty of dismissal. This in spite of the fact that the hearing panel had recommended reinstatement.

However, as the jurisdictional statement shows, the Court of Appeals did reject one minor specification of the general charges of insubordination and conduct unbecoming a teacher against the Appellant regarding lesson plans which necessitated remitting the case to the school board for reconsideration of a penalty. The Board re-read the record and again voted dismissal.

Appellant then commenced "Chapter Three", i.e. another "Article 78" proceeding in which he raised the same arguments including the role of Mr. Pratt. He raised the same due process claims plus new constitutional claims revolving around

the 1977 amendments to Ed.L. 3020-a which went into effect 13 days before Appellee Board voted a second time to dismiss Appellant for (1) using excessive physical force on children; (2) for insubordination and (3) for conduct unbecoming a teacher.

Appellee's determination of dismissal was sustained by the Supreme Court for this County which summarily rejected the constitutional and bias arguments and found the penalty of dismissal appropriate. The Appellate Division affirmed unanimously. *Clayton v. Board of Education of CSD No. 1 of Towns of Conklin, etc.*, (AppDiv Dec 29, 1979) 73 AD 2d 765, 423 NYS 2d 548 (lower court decision not reported) Appellant's attempts to appeal to the Court of Appeals have been detailed in Point I hereof above.

The only real question in Appellant's "Chapter Three" appeal was

whether or not the punishment, in view of the facts found, shocked the conscience of the court. *Pell v. Board of Education, et al*, 34 NY 2d 222, 356 NYS 2d 833, 313 NE 2d 321.

Appellee contends that if the bulk of the alleged constitutional questions raised herein are worthy of this court's consideration, they should have been raised by appeal from the 1977 Court of Appeals decision and not from Appellee's attempt to bite the same apple twice by raising them in a case where the only real issue was the propriety of the penalty.

Based on the above, Appellees insist that this appeal be dismissed for the following additional reasons.

POINT II

This appeal is not timely in that it should have been made from the 1977

Court of Appeals decision which was final rather than from the current *sua sponte* dismissal.

POINT III

This judgment appealed from rests on an adequate non-federal basis, namely, the appropriateness of an administrative decision and the non-retroactive effect of legislated procedural changes. See *Groppi v. Wisconsin*, 400 US 502, 27 Ed.L 2d 571, 91 S.Ct. 490 (1970) to the effect that this court is bound to accept the interpretation of state law by the highest court of said state.

Appellee respectfully moves that this appeal be dismissed.

Dated: August 20, 1980

Respectfully submitted,

Frank C. Shaw, Attorney

SHAW, ESWORTHY, O'BRIEN & CROWLEY
Attorneys for Appellee District
Office and Post Office Address
123 Front Street
Binghamton, New York, 13905
Telephone (607) 723-5408

TO: PAUL E. KLEIN, ESQ.
ASWAD & INGRAHAM, Of Counsel
Office and Post Office Address
46 Front Street
Binghamton, New York, 13905

APPENDIX A

N.Y.S. CONSTITUTION ART. 6, SEC. 3

§ 3. [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him.

APPENDIX B

C.P.L.R. 5602

§ 5602. Appeals to the court of appeals by permission

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

APPENDIX C

C.P.L.R. 5601

§ 5601. Appeals to the court of appeals as of right

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

APPENDIX D

C.P.L.R. 5513(a)(b)& 5514(a)

§ 5513. Time to take appeal, cross-appeal or move for permission to appeal

(a) Time to take appeal as of right. An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, his appeal must be taken within thirty days thereof.

(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

§ 5514. Extension of time to take appeal or to move for permission to appeal

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

APPENDIX E

NEW YORK STATE COURT OF APPEALS RULE 500.2

Section 500.2 Filing and service of appellant's jurisdictional statement.

Within 10 days from the time the appeal is taken, appellant shall file with the clerk one copy of a statement giving the reasons for and the case, statutory, or other authority supporting the assertion that this court has jurisdiction to entertain the appeal and to review the questions raised. The statement shall recite (i) the title of the case, (ii) the court from which the appeal is taken, (iii) the date of service of the notice of appeal or the date of entry of the order granting leave to appeal, (iv) the date and type of service upon the appellant of the order or judgment appealed from and notice of entry thereof and (v) the name and address of the attorney for respondent. There shall be filed with the statement a legible copy of the dated notice of appeal, or the order, if any, granting leave to appeal, the order, judgment or determination appealed from, any other order brought up for review, the opinion or memorandum of the Appellate Division or other intermediate appellate court, the order, judgment or determination reviewed by the Appellate Division or other intermediate appellate court, and the formal or informal findings and conclusions upon which such order, judgment or determination was entered. Where a party will assert that a statute is unconstitutional, notice of this assertion shall be given to the Attorney General in writing at the time of filing this jurisdictional statement and a certification to such effect shall be included in this statement. An appeal shall not be deemed perfected until the filing of this statement and simultaneously with such filing appellant shall serve counsel for all parties with a full set of the papers required by this section. The court may determine, sua sponte, whether it has subject matter jurisdiction and power to review based on the papers submitted in accordance with this section.

APPENDIX F

Appellant's Jurisdictional Statement
to New York Court of Appeals

In the MATTER OF EUGENE F. CLAYTON, Petitioner-Appellant, against CENTRAL SCHOOL DISTRICT NO. OF THE TOWN OF CONKLIN, BINGHAMTON, KIRKWOOD and VESTAL, BROOME COUNTY, NEW YORK; and THE BOARD OF EDUCATION THEREOF, Respondents-Respondents. For Judgment pursuant to Article 78 of the Civil Practice Law and Rules.

For his jurisdictional statement, pursuant to Section 500.2, Rules of the Court of Appeals, the petitioner-appellant hereby presents to the Court the following:

a) The title of the case is In the Matter of Eugene F. Clayton, Petitioner-Appellant against Central School District No. 1 of the Town of Conklin, Binghamton, Kirkwood and Vestal, Broome County, New York, and the Board of Education thereof, Respondent-Respondents, For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules.

b) The Court from which the appeal is taken is the Appellate Division, Third Department.

c) The date of service of the Notice of Appeal is February 14, 1980.

d) The date and type of service upon the appellant of the Order appealed from with notice of entry thereof is service by mail on January 17, 1980.

e) The name and address of the attorney for respondent is Frank C. Shaw, Esq.,

Shaw, Esworthy, O'Brien & Crowley,
123 Front Street, Binghamton, New York,
13905.

Filed herewith are the following attachments:

i) The Notice of Appeal, dated February 14, 1980;

ii) The Order of the Appellate Division, Third Department, being appealed from, dated January 8, 1980;

iii) The written Decision of the Appellate Division, Third Department, dated December 27, 1979;

iv) The Record before the Appellate Division, Third Department;

v) Certification that the Attorney General of the State of New York has been notified in writing that the application of Education Law 3020-a to the petitioner is being claimed to be unconstitutional.

A statement why this Court has jurisdiction to entertain the appeal and to review the questions asked follows:

This is an Article 78 proceeding to review the determination of the respondent Board of Education of May 19, 1977; which determination was made pursuant to Education Law 3020-a with respect to the disciplining of a tenured teacher. The Board of Education dismissed the petitioner, "effective as of the last day that he was paid salary by the District . . ."

The petitioner was a full-time, tenured employee of a public school system at the time of his suspension. Hence he has property and liberty rights in his employment; and if he has been terminated

unjustly or in a manner which is repugnant to due process, his Constitutional rights have been abridged.

The Constitutional questions posed in this litigation are as follows.

First, at the time the charges against the petitioner were originally brought (February, 1974), Education Law 3020-a provided, in part, that: "Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed." One of the charges made against the petitioner related to an incident which had occurred almost four and one-half years before. However, Section 2573 of the Education Law provided that teachers in city school districts could not be charged with alleged misconduct dating back more than three years. Hence, the Education Law made a distinction between teachers in city school districts and teachers in non-city school districts with respect to the time limitations applicable for 3020-a charges. Such a distinction has no basis in law; it is an irrational, arbitrary, and capricious classification. As such, the application of the statute in such a way as to allow the School District to bring charges against this teacher for alleged misconduct so old that no such charges could have been brought against a city school teacher under the same circumstances consitutes a denial of substantive due process and a denial of equal protection under the laws of this State and of the United States.

Second, at the time the determination was made by the Board of Education on May 19, 1977, Education Law 3020-a had been amended, effective April 15, 1977, or more than a month prior to the Board's determination. One of the amendments had the impact of changing from five years to "three years after the occurrence of the alleged imcompetency or misconduct" the limitation barring charges being brought against a tenured teacher. Despite this, the Board of Education considered a charge which was brought approximately four and a half years after it had occurred; apparently by rationalizing that it was not required to follow the dictates of the statute as it then existed, but rather the statute as it existed at the time the charges were originally brought. Hence, in May, 1977, punishment was assigned against the petitioner on the basis of a charge which the statute--as it then existed--prohibited any School District from taking into consideration. As such, the petitioner was punished in a way different from all other teachers who might have charges preferred against them; and this differentiation is a violation of due process and a denial of equal protection under the laws of the State and the United States.

Third, Education Law 3020-a was amended, effective April 15, 1977, in another highly significant way. The amendments made the findings of the tenure hearing panel mandatory upon the Board of Education, rather than advisory, as they had been up to that point in time. The tenure hearing panel in this case ad-

vised that the charges against the petitioner be dropped and that there be no assessment of punishment of any sort. The panel specifically found that there was a lack of substantial evidence against the petitioner and advised his immediate reinstatement. The Board of Education ignored the findings of the tenure hearing panel and terminated the petitioner; apparently on the theory that it was not bound by the statute as it then stook, but rather by the statute at the time the charges were brought. Hence, when it disregarded the tenure hearing panel's conclusions, it dealt with the petitioner in a manner different from the manner in which all other tenured teachers must be treated, as of April 15, 1977. This differentiation and application of the old statute thus constitutes a denial of due process and a denial of equal protection under the laws of this State and the United States.

Fourth, one of the charges against the petitioner is that he was insubordinate and guilty of conduct unbecoming of a teacher by virtue of the fact that he wrote a letter to the editor which disagreed with the conclusions of a previously published letter to the editor by the Vice President of the School Board. The bringing of any such charge is a crude attempt to abridge the petitioner's freedom of speech; and since the charge was utilized throughout the proceeding, the petitioner's First Amendment rights have been violated. Pickering v. Board of Education, 391 U.S. 563; Matter of Puentes v. Board of Education, 24 NY2d 996.

Fifth, the entire process involved a denial of the petitioner's right to due process of law and was done in bad faith. The Vice President of the Board of Education wrote a letter to the editor, alleging that children were being abused in the School District by teachers. The petitioner responded with a letter of his own, in which he argued that the greater problem was abuse of teachers by students. Apparently stung by this public disagreement, the Vice President of the Board, Gordon Pratt, then studied personnel records of the petitioner. Mr. Pratt then directed that an "incident" report be filed with respect to a very minor matter between a student and Mr. Clayton. Mr. Pratt then used an incident which had occurred about four and a half years previous, along with the new, manufactured incident, and the letter to the editor as the bases for charges which he himself offered to the Board of Education. Mr. Pratt then sat on the Board of Education as it decided there was "probable cause" to bring charges against the petitioner; and later he voted with the Board to terminate the petitioner. Through this entire process, then, the Vice President of the Board of Education served as investigator, prosecutor, judge and jury of the petitioner. He was determined that Mr. Clayton be discharged from the District irrespective of the facts, and irrespective of equity or fairness. In such an atmosphere, the petitioner was not given a fair opportunity to rebut the charges and clear his name. On the one occasion when an objective, dispassionate body did review the evidence (the tenure hearing panel), it unanimously rejected

the charges and urged immediate reinstatement. Mr. Pratt's vigorous "investigation" of the petitioner's personnel record and his prosecution of the petitioner before the Board coming, as it did, after being publicly criticized by the petitioner suggests a "probability of actual bias that it is too high to be constitutionally tolerated". Withrow v. Larkin, 421 U.S. 35, 47. The participation of Mr. Pratt in the decision to terminate the petitioner tainted the process with actual bias or at least the probability of actual bias. Accordingly, the petitioner's right to due process of law has been abridged. Mayberry v. Pennsylvania, 400 U.S. 455; Taylor v. Hayes, 418 U.S. 488; cf. Amos v. Board of Education, 54 AD 2d 297, aff'd. 43 NY 2d 706; Matter of Root v. Board of Education, 59 AD 2d 328.

Dated February 22, 1980.

Respectfully submitted,

PAUL E. KLEIN, ESQ.
ASWAD & INGRAHAM, of Counsel
Attorneys for Petitioner-Appellant
Office and P. O. Address
106 Oak Street
Binghamton, New York, 13905
Tel.: (607) 722-3495

APPENDIX G
Letter from Court Clerk

STATE OF NEW YORK
COURT OF APPEALS

Joseph W. Bellacosa
Clerk of the Court

Clerks Office
Albany 12207

February 26, 1980

Charles O. Ingraham, Esq.
Aswad & Ingraham
106 Oak Street
Binghamton, New York 13905

Re: Clayton v. Central School District No. 1 of Town of Conklin

Dear Mr. Ingraham:

I acknowledge receipt of your 500.2 jurisdictional statement in connection with the above-entitled matter.

The Court may examine its subject matter jurisdiction sua sponte with respect to whether a substantial constitutional question is directly involved in the appeal (CPLR 5601 (b)(1)). It appears that the determination below may have rested on alternative and non-constitutional grounds (see generally Cohen and Karger, Powers of the New York Court of Appeals, Ch. 7; specifically Section 57, Section 59).

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persist in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction. Your adversary is likewise afforded this opportunity.

Very truly yours,

s/Joseph W. Bellacosa

Joseph W. Bellacosa

DMS/cpw

cc: Frank C. Shaw, Esq.

APPENDIX H
Appellant's letter re constitutional jurisdiction

ASWAD & INGRAHAM
Attorneys-At-Law
106 Oak Street
Binghamton, New York 13905

Richard N. Aswad Area Code 607
Charles O. Ingraham
Joseph B. Meagher 722-3495

March 7, 1980

State of New York
Court of Appeals
Clerk's Office
Albany, New York 12207

Att: Joseph W. Bellacosa

Re: Clayton vs. Central School District No. 1 of Town of Conklin

Dear Mr. Bellacosa:

This statement is in response to your letter of February 26, 1980, in which you invite us to present any supplemental comments in justification of the Court retaining subject matter jurisdiction in the above-captioned case.

The Appellant appeals to this Court as of right pursuant to Civil Practice Law and Rules Section 5601(b)(1)

from an Order of the Appellate Division, Third Department dated January 8, 1980. By that Order, the Appellate Division affirmed the Appellant's dismissal from employment as a tenured secondary school teacher. In a written decision dated December 27, 1979, the Appellate Division ruled that the penalty of dismissal was not excessive and that there was substantial evidence to support the school board's determinations with respect to its charges against the Appellant.

In the Petition by the Appellant and in the brief presented to the Appellate Division, it was alleged and argued that the school board's determination violated the Appellant's constitutional rights by virtue of the manner in which the determination was made and the factors upon which the determination was based. Specifically, the school board dealt with the Appellant in a manner that was distinct from that in which similarly situated persons were being treated at the time, in violation of the Appellant's right to equal protection of the law. Further, the school board considered in its decision to dismiss the Appellant, the fact that he had written a letter to the editor of a local newspaper criticizing the conclusions of a prior letter written by the vice president of the school board. Such a consideration is in violation of the First Amendment. Finally, the school board vice president's pervasive participation in the investigation, prosecution, and determination of the charges against the Appellant deprived the Appellant of a

fair and impartial hearing in violation of his right to due process.

The Appellate Division did not address these arguments expressly in its decision to affirm the Appellant's dismisal. However, that Court's silence on the issues is immaterial. (Tang vs. Appellate Division, 487 Fd2 138, 141, n. 2 (2d Cir 1974)). The Appellant contends that the process by which he was terminated violated several constitutional rights, and success on any one of those arguments would have required reversal of the termination. Even if the Appellate Division correctly found that the Appellant's termination was supported by substantial evidence and that that penalty was not excessive, reversal would nevertheless be in order had that Court agreed that the school board had unlawfully discriminated against the Appellant, or considered constitutionally impermissible factors in reaching its determination, or deprived the Appellant of a fair and impartial hearing. Thus, notwithstanding its ability to find substantial evidence for the school board's determination and penalty, the Appellate Division could not have reached the decision it did without necessarily considering and rejecting the Appellant's constitutional claims. (See, Winters vs. Lavine, 574 F2d 46, 60 (2d Cir 1978)).

The Appellant now seeks review of the Appellate Division's Order pursuant

to Civil Practice Law and Rules Section 5601(b)(1). The constitutional claims outlined above were explicitly made to the Appellatte Division in the Appellant's Petition and brief below. Moreover, the non-constitutional grounds upon which the Appellate Division based its decision were not alternative to these claims, since a favorable ruling on any one of the Appellant's constitutional claims would have required that his dismissal be reversed. Accordingly, the Appellate Division's decision finally determined an action which directly involved the construction of the United States Constitution. The Appellant, contending that that construction is erroneous, is entitled to appeal to this Court as of right pursuant to Civil Practice Law and Rules Section 5601(b)(1).

Respectfully submitted,

Charles O. Ingraham

COI:jw
cc: Frank C. Shaw, Esq.

APPENDIX I
Appellee's objections to jurisdiction

SHAW, ESWORTHY, O'BRIEN & CROWLEY
Attorneys-At-Law
123 Front Street - Binghamton, N.Y.
13905

March 3, 1980

Hon. Joseph W. Bellacosa
Clerk of Court
Court of Appeals
Eagle & Pine Streets
Albany, New York, 12207

Re: Clayton v. Central School District
No. 1. of Towns of Conklin, etc.
Susquehanna Valley Central Schools

Dear Mr. Bellacosa:

This letter is submitted pursuant to your letter to Charles O. Ingraham, as attorney for the petitioner Clayton, dated February 26. I understand a letter is the type of writing expected.

All of the alleged "constitutional questions" raised in the jurisdictional statement have been before this court previously in an earlier case involving the same matter. *Matter of Eugene F. Clayton, petitioner, vs. BOE of Central School District No. 1 of Conklin, et al,* 41 NY 2d 966, 394 NYS 2d 882 (3) and the companion case argued together *Elmer Hodgkins, petitioner, vs. same,* 41 NY 2d 962, 394 NYS 2d 822 (2).

I quote the titles to certain points in petitioner's brief in the above case:

> "Point III The multiple roles assumed by the appellant and its agents in this tenure hearing deprives respondent of his rights under the due process clause of the Fourteenth Amendment."

> "Point IV The appellant's decision to make respondent's dismissal retroactive to the date of suspension is an unlawful attempt to circumvent the court of appeals decision in Matter of Jerry."

> "Point V Education Law 3020-a is unconstitutional and its unconstitutional infirmities are not rectified by subsequent amendment of the rules and regulations of the New York State Department of Education."

My reply briefs in the same case covered the following points: (To avoid repetition, these points were set forth only in my reply brief in the *Hodgkins* case.)

> "POINT VIII - The role of Mr. Pratt was lawful and proper; the "rule of necessity" is valid in this case."

> "POINT XI - Constitutional considerations."

In addition, all or most of the same alleged "Constitutional issues" were raised and briefed in this case in special term, (Zeller, J.) and before the Appellate Division (Mahoney, P.J., Greenblott, Main, Mikoll and Herlihy, J.J.). Neither court found the issues to be constitutional questions.

I quote from Table of Contents of petitioner's brief to the Appellate Division in this case:

> "Point I. The Board's determination on the charges was unlawful and irregular and should be stricken as a matter of law."
>
> "A. The Board violated Education Law 3020-a, as amended in 1977."
>
> "1. The amendments of Education Law 3020-a, effective April 15, 1977, were binding upon the Board in its May 19, 1977 determination."
>
> "2. The Board's determination is contrary to the dictates of Education Law 3020-a, as amended."
>
> "3. The statutory changes reflected in the amendments to Education Law 3020-a reflect public policy and thus Board's action violates public policy and should be annulled."

"B. Even if Education Law 3020-a, as it stood prior to April 15, 1977, was applicable, the Board's action did not conform to the requirements of the statute."

Point III. The determination of the Board violated the petitioner's right to due process of law and also was done in bad faith."

Not only have most of these same issues been before the Court of Appeals once, they have been before the Appellate Division three times. (1) The recent occasion from which this appeal is sought; (2) the 1976-77 case as to which this court reversed; and (3) a prior case by petitioner and another challenging the amendments made by the Commissioner of Education to the rules governing cases under Ed.L. 3020-a as required to meet the strictures of the federal case, *Kinsella v. BOE CSD No. 7 of the Towns of Amherst and Tonawanda, Erie and Ewald B. Nyquist, Commissioner of Education,* 378 Fed. Supp. 54. See *Hodgkins, et al v. CSD No. 1, Towns of Conklin, etc.* 48 AD 2d 302, 368 NYS 2d 891.

The only new issue is the question of whether the later amendments to E.L. 3020-a should be given retroactive effect. Special Term held they should not and the Appellate Division affirmed. Retroactive application of a statute is

hardly a new frontier of the law. This court has already ruled that the 1977 amendments to Ed.L. 3020-a procedure are not to be applied retroactively when a case has progressed to a stage very similar to that in this case *BOE Lisbon CSD*, 47 NY 2d 279, 418 NYS 2d 291. A similar result was reached earlier by the Second Department in *Melfi v. BOE CSD No. 1 of the Town of Rhinebeck*, 64 AD 2d 631, 406 NYS 2d 874 citing *Lazarus v. Met. El. R. Co.*, 145 NY 2d 581.

For the above reasons, respondent respectfully urges that the proposed appeal be rejected.

Thank you.

Respectfully submitted,

SHAW, ESWORTHY, O'BRIEN
& CROWLEY

Frank C. Shaw

FCS:df
cc - Charles O. Ingraham, Esq.
Aswad & Ingraham

APPENDIX J

CHARGES AND SPECIFICATIONS AGAINST APPELLANT

CHARGE I

You have unwarrantedly used excessive physical force on students of this District in spite of warnings and specific directions from your superiors not to do so.

SPECIFICATION NO. 1

At all times hereinafter mentioned, the District policy on corporal punishment provided in part as follows: ". . . corporal punishment must be reasonable in manner and moderate in degree."

SPECIFICATION NO. 2

By copy to you of a letter from Mr. Stank, your building principal, to Mr. Donnelly, the Superintendent of Schools, dated January 23, 1967, you were advised in writing not to hit in any way, any students. You were further warned that if you did hit any student, it would be viewed as insubordination.

SPECIFICATION NO. 3

On October 21, 1969, you disobeyed the above specific instructions by slapping a student by the name of Henry Hawley; by grabbing said student in such a way that he fell to the floor whereupon you struck him on the shoulder and back area causing bruises on the student's back.

SPECIFICATION NO. 4

As the result of the above incident, (Specification No. 2) you were again instructed by your building Principal, Mr. Stank, not to hit any more students in the future; to send disruptive students to the Guidance Office as a first step measure and you were told that you were not to strike any students.

SPECIFICATION NO. 5

By copy of letter from Mr. Stank, your Junior High Principal, to Dr. Gerhard, Superintendent of Schools, dated October 9, 1973, you were told that you are not to physically discipline students.

SPECIFICATION NO. 6

In spite of the above warnings, the most recent being that referred to in Specification 4 above,

you did on December 10, 1973 grab the arm of Bryan Nick after chasing him for at least forty feet down the "commons" toward the Guidance Office. At that time you started to pull the student back and around by an arm hold but were prevented from further physical actions by the intervention of Mr. Gaffney.

CHARGE II

You have repeatedly committed acts of insubordination.

SPECIFICATION NO. 1

Specifications Nos. 1 through 6 as to Charge I are hereby reiterated and repeated in substantiation of the above Charge II as Specifications 1 - 6 hereof.

SPECIFICATION NO. 7

By letter of October 27, 1969, from your building Principal, to Mr. Donnelly, the Superintendent of Schools, you were instructed to prepare permanent lesson plans for a substitute. In a conference on April 18, 1973, you admitted to Mr. Stank that you had not done lesson plans for three years.

SPECIFICATION NO. 8

On or about November 29, 1973, the Evening Press, a newspaper published in Broome County and circulated in the general area of this School District, contained a Letter to the Editor written by you in which you stated that "many unfortunate, misguided pupils are abusing the teachers!" No wrong doing is imputed or charged against you as to the writing and publishing of this letter but by letter to you from the Superintendent of Schools dated December 7,1973, you were asked to supply the Superintendent with specific information in regard to the time, location, individuals involved in teacher abuse together with any other specific information which bears upon the details of such alleged abuse. You were advised in this letter that the Superintendent wished the information in the very near future. By letter dated January 10, 1974 from the Superintendent, you were advised that because you had not furnished the specific information requested, the Superintendent was concluding that your remarks were irresponsible and for the purpose of inflaming . . . discussion . . .

CHARGE III

You have engaged in conduct which is unbecoming a teacher.

SPECIFICATION NO. 1

Specifications Nos. 1 through 6 as to Charge I above, are hereby reiterated in full in substantiation to Charge III.

Specification 7 to Charge II is hereby reiterated in substantiation of Charge III as Specification 7 (Charge III).

Specification 8 to Charge II is hereby repeated and reiterated as Specification 8 hereof.

APPENDIX K

STATUTORY GROUNDS FOR DISMISSAL OF TENURED TEACHERS

Art. 61 TEACHERS; ADMINISTRATION § 3012

2. At the expiration of the probationary term of a person appointed for such term, subject to the conditions of this section, the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory. Such persons, and all others employed in the teaching, examining or supervising service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty. Each person who is not to be recommended for appointment on tenure, shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period.

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 79-2041

EUGENE F. CLAYTON, Appellant

-vs-

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK, AND THE BOARD OF EDUCATION THEREOF, Appellees.

STATE OF NEW YORK)
: ss:
COUNTY OF BROOME)

FRANK C. SHAW, being duly sworn, deposes and says that he is a member of the Bar of this court representing the Appellees herein.

That on August 25, 1980, deponent served the within motion to dismiss with supporting papers on Paul E. Klein, Aswad and Ingraham, of counsel, as attorneys for the Appellant in this action at 46 Front Street, Binghamton, New York, 13905, the address designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a post office box under the exclusive care and custody of the United States Post

Office Department within the State of New York.

Frank C. Shaw

Sworn to and subscribed
before me this 25th day
of August, 1980.

Ellen M. Browne
Notary Public

ELLEN M. BROWNE
Notary Public, State of New York
Residing in Broome County
Commission expires March 30 1982